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LOS ANGELES TIMES
2 March 1984

Court Asked to Rule Out Possible Death Sentence in Trial of Accused Spy

By PHILIP HAGER, *Times Staff Writer*

SAN FRANCISCO—The U.S. 9th Circuit Court of Appeals was asked Thursday to intervene in the case of an accused Silicon Valley spy and overturn a trial judge's ruling that the defendant could be sentenced to death for espionage.

Jerrold M. Ladar, attorney for James D. Harper, a Mountain View engineer charged with selling ballistic missile defense secrets to the Soviet Bloc, told the three-member panel that the judge's ruling had "brought a complete halt" to plea negotiations in the case. Harper's trial is scheduled to begin April 24.

The ruling, made by U.S. District Judge Samuel Conti, contradicts both defense and Justice Department lawyers, who have concluded that federal statutes authorizing the death penalty for espionage have been long since been invalidated by the U.S. Supreme Court.

Conti's finding, Ladar said, is unfairly hindering Harper in plea negotiations because of the widespread doubt about its validity. Should the panel intercede now to overturn the ruling, he said, "you will have removed an entire sea of uncertainty—and that will be most

helpful to both the government and the defendant."

Assistant U.S. Atty. John C. Gibbons made no attempt to defend Conti's ruling. But he argued that the appeals court need not rule on the legality of the death penalty unless and until Harper is convicted and a capital sentence actually imposed. Harper, if he wishes, could enter a "conditional plea," accepting only a lesser punishment, the prosecutor said.

But Gibbons encountered a series of pointed questions from an openly skeptical panel.

"How can (Harper) make an intelligent plea if he's told the penalty is death when in fact it isn't?" asked Appellate Justice Betty Binns Fletcher.

Similarly, Appellate Justice Joseph T. Sneed asked the prosecutor, "Supposing a judge went off into medieval history . . . and said, 'I believe the defendant can be drawn and quartered.' What would we do?"

Finally, Gibbons conceded that the government would "not oppose" a "clarification" of the issue by the court. The panel took the matter under submission.

The question went to the court little more than a week after the U.S. Senate approved new legislation to allow the death penalty for treason, espionage and certain other federal crimes.

The executions of Julius and Ethel Rosenberg in 1953 were the only ones in which the death penalty has been imposed for peacetime spying in the United States.

In 1972, the Supreme Court issued a sweeping ruling that was widely regarded to have struck down all existing state and federal capital

statutes for failing to provide adequate guidelines to judges and juries considering imposition of the death penalty. Since then, 38 states have rewritten their capital punishment laws to conform with that and subsequent court rulings, and a new federal statute providing for executions for air piracy was enacted in 1974.

Conti, a judge known here for his stern demeanor and stiff sentences, ruled Jan. 12 that despite contentions from the government and the defense, the statutes providing for death for espionage have never been "squarely confronted" by the courts.

The judge, stressing that he was rendering no opinion on the guilt or innocence of Harper, said that the death penalty is not legally disproportionate, "given the potential consequences of . . . espionage, which may threaten the lives of all citizens of the United States."

If Harper is convicted, Conti said, he as judge could formulate and apply sentencing guidelines that would conform with federal espionage statutes and court rulings on capital punishment.

Harper, 49, is accused of several violations of espionage laws, including conspiracy to deliver and delivering national defense secrets to a foreign government. He is charged with copying and later selling 31 classified reports to Polish agents in Europe and Mexico.